

EXHIBIT 47

CONFIDENTIAL - L. Rabinowitz

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

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In Re: Chapter 11 Case No.
08-13555 (JMP)

LEHMAN BROTHERS HOLDINGS INC., (Jointly Administered)
et al.,

Debtors.

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* * * CONFIDENTIAL * * *

VIDEOTAPED DEPOSITION OF LAURENCE RABINOWITZ

New York, New York

September 4, 2013

Reported by:

KATHY S. KLEPFER, RMR, RPR, CRR, CLR

JOB NO. 65270

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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 reporter please swear in the witness.</p> <p>3 * * *</p> <p>4 L A U R E N C E R A B I N O W I T Z, called as a</p> <p>5 witness, having been duly sworn by a Notary</p> <p>6 Public, was examined and testified as</p> <p>7 follows:</p> <p>8 EXAMINATION BY</p> <p>9 MR. ISAKOFF:</p> <p>10 Q. Would you please state your full name</p> <p>11 for the record.</p> <p>12 A. Laurence Anton Rabinowitz.</p> <p>13 Q. And what is your current business</p> <p>14 address?</p> <p>15 A. One Essex Court, Temple, London, EC4Y</p> <p>16 9AR.</p> <p>17 Q. Have you ever testified before?</p> <p>18 A. By way of deposition, no.</p> <p>19 Q. Have you ever testified in any</p> <p>20 proceeding?</p> <p>21 A. I've testified in proceedings in</p> <p>22 London probably ten years ago.</p> <p>23 Q. It would help me a great deal if you</p> <p>24 could keep your voice up a little bit.</p> <p>25 A. I'll do my best.</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 Q. I'm only seated about five feet apart</p> <p>3 and I'm having a very hard time just hearing</p> <p>4 you.</p> <p>5 So it was only on one occasion?</p> <p>6 A. Correct.</p> <p>7 Q. And what was the nature of the</p> <p>8 proceeding?</p> <p>9 A. I had acted for Enron in proceedings</p> <p>10 that they had brought against other oil and gas</p> <p>11 companies relating to a power plant. There was</p> <p>12 an issue as to whether the proceedings were</p> <p>13 brought bona fide.</p> <p>14 I gave evidence as to the legal advice</p> <p>15 that had been given in order to show that the</p> <p>16 proceedings had been brought bona fide. My</p> <p>17 evidence was accepted and Enron won that</p> <p>18 particular issue.</p> <p>19 Q. All right. So you testified as a fact</p> <p>20 witness as to what occurred?</p> <p>21 A. Effectively, as a fact witness, yes.</p> <p>22 Q. Have you ever testified as an expert</p> <p>23 witness before?</p> <p>24 A. Not by way of deposition. I gave a</p> <p>25 witness statement or affidavit in proceedings</p>
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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 involving Vivende. Again, I think this was</p> <p>3 eight or nine years ago. It was an issue</p> <p>4 relating to a conflict of laws point and, more</p> <p>5 particularly, how in England class actions were</p> <p>6 dealt with, if at all.</p> <p>7 Q. Is that the only occasion on which you</p> <p>8 have provided any evidence as an expert by way</p> <p>9 of something in writing or orally?</p> <p>10 A. To my recollection, yes.</p> <p>11 Q. Have you -- have you been made</p> <p>12 familiar with United States deposition</p> <p>13 procedure?</p> <p>14 A. I have as a result of the lawyers for</p> <p>15 Canary Wharf explaining the proceedings to me,</p> <p>16 or the procedures to me.</p> <p>17 Q. You understand we have a court</p> <p>18 reporter taking down everything verbatim; that</p> <p>19 in order for that to be effective, we should try</p> <p>20 not to talk over one another. And I will do my</p> <p>21 best for that. If you have not finished</p> <p>22 answering a question when I start to ask you</p> <p>23 one, it's because I will have misunderstood and</p> <p>24 just let me know that you haven't finished.</p> <p>25 A. Fine.</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 Q. We're also recording this by video.</p> <p>3 You're obliged to respond verbally. Shakes of</p> <p>4 the head and so forth won't be picked up in the</p> <p>5 transcript. If there's something about a</p> <p>6 question you don't understand, please ask me and</p> <p>7 I'll do my best to clarify it.</p> <p>8 A. Thank you.</p> <p>9 Q. If you want a break, just say so. In</p> <p>10 terms of consultation, you may not consult with</p> <p>11 counsel while a question is pending unless it</p> <p>12 concerns a matter of privilege, but that's</p> <p>13 unlikely to come up.</p> <p>14 Is there any reason not to go forward</p> <p>15 today?</p> <p>16 A. Not that I'm aware of.</p> <p>17 Q. What, if anything, have you done to</p> <p>18 prepare for your deposition?</p> <p>19 A. I reminded myself of the reports that</p> <p>20 I had produced and that had been produced by</p> <p>21 your expert. I met yesterday with the lawyers</p> <p>22 for Canary Wharf and we spent some time with</p> <p>23 them explaining to me the proceedings and what</p> <p>24 was going to happen today and effectively</p> <p>25 discussing, in effect, what was at issue.</p>

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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 then did an LLB, which is the South African law</p> <p>3 course, law qualification, before coming to</p> <p>4 England on a Rhodes Scholarship, where I did two</p> <p>5 further law degrees.</p> <p>6 Q. Two further law degrees?</p> <p>7 A. Two further law degrees.</p> <p>8 So, in fact, I have three law degrees.</p> <p>9 Q. All right. And what are your law</p> <p>10 degrees in, if that's how they're -- tell me</p> <p>11 about the --</p> <p>12 A. Well, they're in law.</p> <p>13 Q. In law, okay. And what is the</p> <p>14 difference between the two?</p> <p>15 A. Between the two what?</p> <p>16 Q. You said you got two law degrees in</p> <p>17 England, and I guess I'm -- I'm not familiar</p> <p>18 with that system.</p> <p>19 A. Okay. The basic law degree in England</p> <p>20 is done as an undergraduate course, certainly at</p> <p>21 Oxford and indeed I think in most English</p> <p>22 universities. That's the BA in jurisprudence</p> <p>23 that you see referred to in paragraph 7 of my</p> <p>24 report.</p> <p>25 That is a degree that covers -- I</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 think you do 12 subjects. You then have the</p> <p>3 opportunity, if you get a first and you are</p> <p>4 selected, to do a BCL, which is I guess roughly</p> <p>5 the equivalent of an LLM, although regarded</p> <p>6 certainly in England as having a higher status</p> <p>7 than that. So that is a law degree, a</p> <p>8 specialist law degree, an advanced law degree</p> <p>9 done by a very select group of people.</p> <p>10 By "select," I mean a small group of</p> <p>11 people. You need to qualify for it.</p> <p>12 Q. All right. And how long did each of</p> <p>13 those degree programs last?</p> <p>14 A. The jurisprudence degree is a</p> <p>15 three-year degree. I was allowed to take that</p> <p>16 in two years because I had previously done a</p> <p>17 three-year law degree in South Africa, so that's</p> <p>18 five years of law before I did the BCL.</p> <p>19 The BCL is a degree which you can</p> <p>20 either do in two years or one year. I did it in</p> <p>21 one year.</p> <p>22 Q. Okay. And paragraph 8 refers to the</p> <p>23 Jutta Prize. What is that?</p> <p>24 A. Well, as it says, it's the prize for</p> <p>25 the best non-graduating law student of the</p>
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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 University of South Africa. In effect, what</p> <p>3 they have at the university, University of</p> <p>4 Witwatersrand, is a prize for the top graduating</p> <p>5 student and the top non-graduating student.</p> <p>6 Jutta was a famous, I think, judge in South</p> <p>7 African history and he gave his name to this</p> <p>8 prize.</p> <p>9 Q. And you won both of them?</p> <p>10 A. I won it in both years.</p> <p>11 Q. You say that you're the current editor</p> <p>12 of Weinberg & Blank on takeovers and mergers,</p> <p>13 and it's the leading text on that subject.</p> <p>14 Have you done any writing in the field</p> <p>15 of landlord and tenant law?</p> <p>16 A. No, I haven't.</p> <p>17 Q. And have you done any writing in the</p> <p>18 field of the law of guarantees?</p> <p>19 A. No, I haven't.</p> <p>20 Q. What do you think makes you an expert</p> <p>21 on the subject matter of this case?</p> <p>22 A. I have many years' experience</p> <p>23 practicing in commercial law. Law of guarantees</p> <p>24 is a subset of the law of contract, which is my</p> <p>25 specialist area, if you like, it's what I do.</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 Commercial law is contract, and contract</p> <p>3 includes guarantees.</p> <p>4 I have over the years advised on a</p> <p>5 number of occasions in relation to guarantees</p> <p>6 and indemnities, and I guess, more than that,</p> <p>7 the way in which English law works, I suspect</p> <p>8 the way in which American, US law works, is that</p> <p>9 the law is to be gleaned from decided cases.</p> <p>10 I have an expertise in understanding</p> <p>11 and interpreting English law cases and, in</p> <p>12 particular, English law cases in the commercial</p> <p>13 law field.</p> <p>14 Q. Isn't that what all lawyers do?</p> <p>15 A. Well, maybe some lawyers do it better</p> <p>16 than others, but I guess that is what all</p> <p>17 lawyers do. Indeed, I suspect in England a lot</p> <p>18 of lawyers don't practice in commercial law. In</p> <p>19 England, there are subdivisions between</p> <p>20 commercial law, I guess people do administrative</p> <p>21 law, they do criminal law, matrimonial law.</p> <p>22 Q. Right. Is there anything that makes</p> <p>23 you more of an expert in the subject matter of</p> <p>24 this case than other lawyers practicing</p> <p>25 commercial law in England?</p>

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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 A. I suppose that there will be lawyers</p> <p>3 in England who have an equal expertise to me,</p> <p>4 but there will be some who don't have either my</p> <p>5 experience or, indeed, I guess my abilities,</p> <p>6 without trying to be funny about it, in terms of</p> <p>7 analyzing and understanding commercial law</p> <p>8 cases.</p> <p>9 Q. So what makes you an expert in this</p> <p>10 field as compared to other commercial lawyers is</p> <p>11 that you are better at it than they are?</p> <p>12 A. I have a great deal of experience in</p> <p>13 the area and I understand the way English law</p> <p>14 works.</p> <p>15 Q. Do you believe you have more or less</p> <p>16 experience than Richard Millett in the areas</p> <p>17 that are the subject matter of this case?</p> <p>18 A. Mr. Millett, because he's been</p> <p>19 involved in a textbook, would certainly have a</p> <p>20 more general familiarity with the Law of</p> <p>21 Guarantees, as he calls his book, than I would.</p> <p>22 However, in relation to the issues that arise in</p> <p>23 this dispute, I would suggest that I have as</p> <p>24 much expertise as he does because there is no</p> <p>25 real dispute between us as to what the law of</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 guarantees and indemnities is. It's all about</p> <p>3 the interpretation of that law to the facts of</p> <p>4 this case.</p> <p>5 In terms of that, that is to say the</p> <p>6 interpretation of the law to the facts of this</p> <p>7 case, that primarily turns on issues of</p> <p>8 contractual interpretation. In that particular</p> <p>9 area, I would suggest I have at least as much</p> <p>10 expertise, if not more, than Mr. Millett.</p> <p>11 Q. Paragraph 14 on page 4 says, "I have</p> <p>12 not testified as an expert at trial or by</p> <p>13 deposition in the last four years," and just to</p> <p>14 confirm, you have never testified as an expert</p> <p>15 at trial or by deposition at any time in your</p> <p>16 career, correct?</p> <p>17 A. Correct.</p> <p>18 Q. Okay. And let's go to appendix A,</p> <p>19 which is your CV. Did you write this yourself?</p> <p>20 A. I think this was written by the clerks</p> <p>21 in my chambers. They probably showed bits to</p> <p>22 me, but I wasn't the primary author of this. By</p> <p>23 "this" we're talking about the CV at the end.</p> <p>24 Q. Yes, we are. Appendix A.</p> <p>25 A. Yes.</p>
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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 Q. Have you read this?</p> <p>3 A. Yes, I have read it.</p> <p>4 Q. Is there anything wrong in this CV?</p> <p>5 A. Is there anything wrong? There's</p> <p>6 nothing wrong in the CV that I'm aware of. It</p> <p>7 doesn't identify everything I've ever done</p> <p>8 because that would be tedious and too lengthy.</p> <p>9 There may be small errors I haven't spotted, but</p> <p>10 I think basically it gives the right impression</p> <p>11 of what I do.</p> <p>12 Q. All right. On page 1 of this, there's</p> <p>13 a heading toward the bottom that says Scope of</p> <p>14 Practice.</p> <p>15 A. Yes.</p> <p>16 Q. And I don't see anything about either</p> <p>17 real estate litigation or landlord and tenant</p> <p>18 cases. Have you done any other than in this</p> <p>19 case?</p> <p>20 A. I have been advised in -- I've been</p> <p>21 involved in advising on cases relating to</p> <p>22 guarantees. That may not have been your</p> <p>23 question. I think it may have been related to</p> <p>24 real estate litigation and?</p> <p>25 Q. Landlord and tenant.</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 A. Landlord and tenant.</p> <p>3 I have given advice in relation to</p> <p>4 landlord and tenant issues insofar as that is</p> <p>5 advice about the meaning of contractual</p> <p>6 provisions.</p> <p>7 Have I been involved in litigation</p> <p>8 before the courts on that? I have no -- I don't</p> <p>9 recollect being involved in any case on landlord</p> <p>10 and tenant.</p> <p>11 Q. Do you know whether Mr. Millett has</p> <p>12 been involved in any landlord and tenant or real</p> <p>13 estate litigation in his career?</p> <p>14 A. I have no idea whether he's been</p> <p>15 involved in landlord and tenant or real estate</p> <p>16 litigation.</p> <p>17 Q. Page 2 of your CV, the top, talks</p> <p>18 about arbitration. I note that the last bullet</p> <p>19 under that says you were nominated as a</p> <p>20 co-arbitrator. Did you serve?</p> <p>21 A. Yes, I did.</p> <p>22 Q. Okay.</p> <p>23 A. In fact, there were three separate</p> <p>24 arbitrations.</p> <p>25 Q. I believe I asked you -- did I ask you</p>

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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 the principle applying as against the party</p> <p>3 invoking or benefiting from a particular</p> <p>4 clause." Do you see that?</p> <p>5 A. I do.</p> <p>6 Q. Do you have a view on that subject as</p> <p>7 to whether it applies to the draftsperson?</p> <p>8 A. As I say there, there are differing</p> <p>9 views. The view I have on contra proferentem is</p> <p>10 that it's a largely relevant doctrine, certainly</p> <p>11 in commercial contracts between two</p> <p>12 sophisticated commercial parties.</p> <p>13 So, to the extent I have a view as to</p> <p>14 when it applies as between those people, I don't</p> <p>15 have a strong view. I'm very happy to go with</p> <p>16 what Sir Kim says about there being two views.</p> <p>17 Q. Let's just talk about what triggers</p> <p>18 the contra proferentem rule.</p> <p>19 A. Uh-huh.</p> <p>20 Q. Do you have a view as to whether or</p> <p>21 not -- so you don't have a view as to whether it</p> <p>22 applies with respect to who is the draftsperson;</p> <p>23 is that correct?</p> <p>24 A. I don't have a strong view. To me the</p> <p>25 key question is whether it applies at all rather</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 than whether it applies to this person or that</p> <p>3 person.</p> <p>4 Q. All right. And do you agree, as you</p> <p>5 say here, that it applies against the party</p> <p>6 either invoking or benefiting from the</p> <p>7 particular clause?</p> <p>8 A. Well, that is one of the two views,</p> <p>9 and I can see that the contra proferentem</p> <p>10 doctrine, if it ever applies, may be invoked</p> <p>11 against the person who seeks to benefit.</p> <p>12 Q. Would you agree that whether it's the</p> <p>13 draftsperson or the party invoking it or the</p> <p>14 party benefiting from it in this case, it's</p> <p>15 Canary Wharf in all three?</p> <p>16 A. Yes, I would agree.</p> <p>17 Q. And your view is that the contra</p> <p>18 proferentem rule is largely irrelevant, as I</p> <p>19 understand your testimony; is that correct?</p> <p>20 A. That is correct in the context of the</p> <p>21 case involving Canary Wharf on one side and</p> <p>22 Lehman on the other side, both very</p> <p>23 sophisticated parties, who neither of whom need</p> <p>24 the protection in the way that a consumer might</p> <p>25 need from rules like the contra proferentem</p>
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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 rule.</p> <p>3 Q. All right. Do you have any -- do you</p> <p>4 cite any case law for the notion that the contra</p> <p>5 proferentem rule does not apply as between two</p> <p>6 commercially sophisticated parties?</p> <p>7 A. Well, if you look further down</p> <p>8 paragraph 33, you will see a reference to Mrs.</p> <p>9 Justice Gloster, now Lady Justice Gloster, "the</p> <p>10 principle is 'of uncertain application and</p> <p>11 little utility in the context of commercially</p> <p>12 negotiated agreements.'"</p> <p>13 That reflects a long-standing</p> <p>14 understanding to the effect that, where you're</p> <p>15 doling with sophisticated parties who can take</p> <p>16 care of themselves and object to what is being</p> <p>17 preferred to them, as Lehman would plainly have</p> <p>18 been able to do, the contra proferentem rule</p> <p>19 really doesn't help.</p> <p>20 Q. Well, would you agree that where a</p> <p>21 court who is looking at a contract is unable to</p> <p>22 determine because there are things that point</p> <p>23 both ways as to its meaning, that it is a rule</p> <p>24 at least of last resort?</p> <p>25 A. It certainly can be a rule of last</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 resort. As I say, I think the overriding point</p> <p>3 is the point that Mrs. Justice Gloster makes;</p> <p>4 that it is of uncertain utility in a case</p> <p>5 between two sophisticated commercial parties.</p> <p>6 Q. So you have said, and I want to put</p> <p>7 the question maybe a little bit differently.</p> <p>8 Where a court finds itself scratching</p> <p>9 its head because there are aspects of the</p> <p>10 contract that point both ways, would you agree</p> <p>11 that the contra proferentem principle applies in</p> <p>12 that circumstance as a matter of last resort?</p> <p>13 A. I think I need to unbundle part of</p> <p>14 what you have said. The fact that there are</p> <p>15 provisions in the contract which point both ways</p> <p>16 is not enough to invoke, even as a last resort,</p> <p>17 the contra proferentem rule because it seems to</p> <p>18 me before you get to the point of last resort,</p> <p>19 what the court has to do, even if there are</p> <p>20 provisions pointing both ways, is to interpret</p> <p>21 that contract, having regard to all those</p> <p>22 provisions, and form a view as to what it thinks</p> <p>23 the parties intended.</p> <p>24 To my mind, the idea of as a last</p> <p>25 resort is something that judges occasionally say</p>

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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 they're doing in a sense to buttress a</p> <p>3 conclusion that they have already reached.</p> <p>4 Q. All right. Would you agree that it is</p> <p>5 a tie-breaker where a court finds that it</p> <p>6 literally cannot tell?</p> <p>7 A. I would accept that in the, in my</p> <p>8 view, almost nonexistent circumstances where a</p> <p>9 court literally cannot tell. I can't conceive</p> <p>10 of how that could happen, but were there to be a</p> <p>11 case in which a court literally cannot tell what</p> <p>12 the parties intended, it may say as a last</p> <p>13 resort, well, we will go with the contra</p> <p>14 proferentem rule.</p> <p>15 But as I say, I can't conceive of a</p> <p>16 circumstance in which a court would come to the</p> <p>17 conclusion that it literally cannot tell what</p> <p>18 the parties intended.</p> <p>19 Q. That just never happens?</p> <p>20 A. A court concluding that it literally</p> <p>21 cannot tell, certainly in an English court, that</p> <p>22 just won't happen.</p> <p>23 Q. Why do they even have such a rule?</p> <p>24 A. That's a very good question. Indeed,</p> <p>25 that's why people like Mrs. Justice Gloster</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 doubt the existence of such a rule.</p> <p>3 Sorry, to be fair, I mean, a contra</p> <p>4 proferentem rule you might find in a situation</p> <p>5 where you're dealing with a consumer someone</p> <p>6 buying a product from some big corporation in</p> <p>7 terms imposed on them. The court in those</p> <p>8 circumstances may say, well, you're dealing with</p> <p>9 consumers; you have to be clear and we're going</p> <p>10 to construe this against you.</p> <p>11 Q. Would you agree that, wherever it</p> <p>12 applies, it applies to the interpretation of the</p> <p>13 contract as a whole?</p> <p>14 A. Yes.</p> <p>15 Q. Now, if you'll go back to Exhibit 102.</p> <p>16 A. That is --</p> <p>17 Q. The Millett supplemental report.</p> <p>18 A. Thank you.</p> <p>19 Q. And starting on page 4, he is treating</p> <p>20 a subject that was brought up by the testimony</p> <p>21 of Mr. Briam of Clifford Chance, and his -- are</p> <p>22 you familiar with this point?</p> <p>23 A. I have seen this point, yes. I am</p> <p>24 familiar with this point in the sense that I'm</p> <p>25 familiar with what Mr. Briam said and I'm</p>
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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 familiar with what Mr. Millett has said in</p> <p>3 response to that.</p> <p>4 Q. Okay. Can you summarize what it is</p> <p>5 that you understand Mr. Briam to have said and</p> <p>6 what Mr. Millett said in response? Maybe that's</p> <p>7 the quickest way to get at this.</p> <p>8 A. What Mr. Briam said is summarized in</p> <p>9 paragraph 15 of Mr. Millett. Mr. Briam</p> <p>10 effectively suggested that, in a situation of</p> <p>11 forfeiture of the lease by LBL, it was</p> <p>12 conceivable that an English court, applying the</p> <p>13 doctrine of relief from forfeiture, might allow</p> <p>14 LBHI to take over the lease.</p> <p>15 Mr. Millett says he's done some work</p> <p>16 and he's not aware of any suggestion that</p> <p>17 English law would allow that result to arise.</p> <p>18 Q. And have you yourself formed a view on</p> <p>19 that subject?</p> <p>20 A. My view is Mr. Millett is right about</p> <p>21 this. I understand why Mr. Briam says what he</p> <p>22 says, but in my view, what Mr. Millett says is</p> <p>23 correct.</p> <p>24 Q. Sir, you would agree that at the point</p> <p>25 where Canary Wharf has exercised forfeiture,</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 that unless it exercised its put option under</p> <p>3 Section 7(a) of Schedule 4, LBHI was not in a</p> <p>4 position to demand a lease?</p> <p>5 MR. DeLEEUEW: Objection to form.</p> <p>6 Go ahead.</p> <p>7 A. I would agree that, outside the</p> <p>8 circumstances of 7, paragraph 7 of Schedule 4,</p> <p>9 LBHI was not in a position where it would become</p> <p>10 the leaseholder.</p> <p>11 Q. This was -- whether LBHI would have a</p> <p>12 lease or not was entirely the option of Canary</p> <p>13 Wharf, you would agree, correct, at the point of</p> <p>14 forfeiture?</p> <p>15 A. Whether or not LBHI would have a lease</p> <p>16 was dependent upon whether -- well, it was under</p> <p>17 a contingent obligation to take a lease should</p> <p>18 Canary Wharf exercise its option.</p> <p>19 Q. Both you and Mr. Millett spend a great</p> <p>20 deal of time on the question as to whether</p> <p>21 Schedule 4 of the LBL lease is what's called</p> <p>22 under English law an indemnity versus a</p> <p>23 guarantee, and we'll go into the subject I</p> <p>24 imagine in some detail, but what difference does</p> <p>25 it make whether it's a guarantee or an indemnity</p>

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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 be the law relating to indemnities and</p> <p>3 guarantees.</p> <p>4 Q. And would you agree that this opinion</p> <p>5 is an excellent summary of the relevant law?</p> <p>6 A. I would agree that this is a good and</p> <p>7 accurate statement of the relevant law.</p> <p>8 Q. And would you also agree that the</p> <p>9 approach of this opinion is how an English court</p> <p>10 would approach the dispute in this case as to</p> <p>11 whether Schedule 4 is a guarantee or an</p> <p>12 indemnity?</p> <p>13 A. I think that may be too general.</p> <p>14 Certainly an English court would look at this</p> <p>15 case and say this states some of the relevant</p> <p>16 principles. It would look at other cases as</p> <p>17 well and then interpret the contract to see</p> <p>18 whether it was of the view that it was a</p> <p>19 contract of indemnity or guarantee.</p> <p>20 Q. Okay. Can we turn to page 311 of this</p> <p>21 opinion. And the pages of this are very</p> <p>22 helpfully lettered along the side to give us an</p> <p>23 easy reference, and you see right below (c) it</p> <p>24 says "The Law"?</p> <p>25 Is that the portion of the opinion</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 that you regard as the summary?</p> <p>3 A. That's the part of the judgment which</p> <p>4 I take to be where Sir William Blackburne sets</p> <p>5 out his understanding of the relevant law here.</p> <p>6 Q. All right. And in that paragraph or</p> <p>7 right opposite (d), one of the first things he</p> <p>8 does, in addition to citing Chitty on Contracts,</p> <p>9 is he cites Andrews and Millett on the law of</p> <p>10 guarantees. Do you see that?</p> <p>11 A. I see that.</p> <p>12 Q. And that is Richard Millett who is</p> <p>13 Lehman's expert in this case, correct?</p> <p>14 A. That is Richard Millett. Sorry, the</p> <p>15 Andrews and Millett mentioned there, the Millett</p> <p>16 is Mr. Richard Millett, yes.</p> <p>17 Q. All right. And would you regard that</p> <p>18 treatise as authoritative?</p> <p>19 A. I think I've already said I would</p> <p>20 regard it as one of the key textbooks.</p> <p>21 Q. All right. If you look then at the</p> <p>22 paragraph opposite (e), one of the points that</p> <p>23 this opinion makes is that it's an area of law</p> <p>24 bedeviled by imprecise terminology, and</p> <p>25 therefore, it is important not to confuse the</p>
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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 label given by the parties with the substance of</p> <p>3 the obligation. Do you see that?</p> <p>4 A. I see that.</p> <p>5 Q. Do you agree with that?</p> <p>6 A. I agree that that is good -- a good</p> <p>7 warning to have. Just because someone says this</p> <p>8 is a guarantee, it doesn't mean it's a</p> <p>9 guarantee. What matters is what are the nature</p> <p>10 of the obligations included in that contract.</p> <p>11 Q. And toward the bottom of that same</p> <p>12 paragraph, he says, "Further, as Ms. Andrews</p> <p>13 observed, the Court must endeavor to avoid a</p> <p>14 construction which renders a clause otiose or</p> <p>15 duplicative."</p> <p>16 What does that mean?</p> <p>17 A. Well, I think what he's saying is if</p> <p>18 you come up with a construction which results in</p> <p>19 a provision appearing to have no effect or</p> <p>20 consequence, that may be an indication that the</p> <p>21 construction you have come up with or the</p> <p>22 interpretation you have come up with may need</p> <p>23 reconsideration.</p> <p>24 I ought, however, to say that the view</p> <p>25 that Sir Andrew -- Sir William Blackburne</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 expresses there is not a universally held view,</p> <p>3 and there are certainly comments by Lord</p> <p>4 Hoffman, who is regarded as one of the leading</p> <p>5 judges in England over the last few decades, to</p> <p>6 the contrary effect; that is to say the argument</p> <p>7 that something is otiose he has suggested that</p> <p>8 it really has very little weight at all.</p> <p>9 So, as with matters of -- all matters</p> <p>10 of interpretation of contract, people have a lot</p> <p>11 of, in a sense, weapons in their armory as to</p> <p>12 how they might get to a particular conclusion.</p> <p>13 Not everyone always agrees as to what matters.</p> <p>14 Q. We'll test that out a little bit.</p> <p>15 A. Okay.</p> <p>16 Q. If you'll go toward the bottom of the</p> <p>17 page, the opinion states, "A contract of</p> <p>18 guarantee, in the true sense, is a contract</p> <p>19 whereby the surety (the guarantor) promises the</p> <p>20 creditor to be responsible for the due</p> <p>21 performance by the principal of his existing or</p> <p>22 future obligations to the creditor if the</p> <p>23 principal fails to perform them or any of them."</p> <p>24 Do you agree with that?</p> <p>25 A. I agree that that is one of the</p>

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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 indicia that something is a contract of</p> <p>3 guarantee, yes.</p> <p>4 Q. And if you go to the next page, that</p> <p>5 page 312 -- I guess part of what I read was on</p> <p>6 312 -- a few lines down, it says, "The surety's</p> <p>7 liability in such a case is conditional upon the</p> <p>8 principal's failure to pay the particular debt."</p> <p>9 Would you agree that that is also an</p> <p>10 indicia of something being a guarantee where it</p> <p>11 is contingent upon the principal's failure to</p> <p>12 perform?</p> <p>13 A. I would. I think what Sir William</p> <p>14 Blackburne is describing is the fact that a</p> <p>15 guarantee is, in general, regarded as a</p> <p>16 secondary obligation, that is to say the primary</p> <p>17 debtor has the primary obligation and the</p> <p>18 guarantor has a secondary obligation, and he</p> <p>19 says that in order to distinguish it from the</p> <p>20 contract of indemnity where the surety has a</p> <p>21 primary obligation or undertakes the primary</p> <p>22 obligation.</p> <p>23 Q. Right, and that's the point that is</p> <p>24 made in the next paragraph where it says, "An</p> <p>25 essential distinguishing feature of the true</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 contract of guarantee -- but not its only one --</p> <p>3 is that the liability of the surety (i.e., the</p> <p>4 guarantor) is always ancillary or secondary to</p> <p>5 that of the principal, who remains primarily</p> <p>6 liable to the creditor."</p> <p>7 Is that correct?</p> <p>8 A. That's correct.</p> <p>9 Q. And what is the co-extensiveness</p> <p>10 principle?</p> <p>11 A. Well, it's what Sir William Blackburne</p> <p>12 says between (e) and (f). "...the consequence</p> <p>13 that there is usually no liability on the part</p> <p>14 of the guarantor if the underlying obligation is</p> <p>15 void or unenforceable, or if the obligation</p> <p>16 ceases to exist (to which principal -- the</p> <p>17 so-called principal of co-extensiveness -- there</p> <p>18 are, however, a number of exceptions)."</p> <p>19 In other words, if the primary debtor</p> <p>20 is not liable, then nor will the guarantor be</p> <p>21 liable.</p> <p>22 Q. And an indemnity contract, that's not</p> <p>23 always true, right?</p> <p>24 A. An indemnity contract, the liability</p> <p>25 of the indemnitor does not -- does not depend</p>
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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 upon the primary debtor also being liable.</p> <p>3 Q. And in fact, the primary debtor might</p> <p>4 very well have fulfilled his or its obligations</p> <p>5 and the indemnitor may yet have different</p> <p>6 obligations for which it's liable anyway?</p> <p>7 A. Well, I'm not sure that I quite follow</p> <p>8 how that arises. I mean, in the end, the</p> <p>9 indemnitor and the guarantor are both giving an</p> <p>10 obligation by way of security for something.</p> <p>11 It's perfectly possible for the indemnitor to</p> <p>12 agree to obligations which go beyond what the</p> <p>13 primary debtor does, but whether he does that as</p> <p>14 an indemnitor, I'm not sure.</p> <p>15 Q. If you go to the next paragraph, this</p> <p>16 is where the opinion in Vossloh talks about the</p> <p>17 contract of indemnity.</p> <p>18 A. Sorry, when you say -- that's</p> <p>19 paragraph 25, is it?</p> <p>20 Q. Yes. Where he writes, "In contrast to</p> <p>21 the contract of guarantee is the contract of</p> <p>22 indemnity. In one sense all contracts of</p> <p>23 guarantee (strictly so called) are contracts of</p> <p>24 indemnity (as indeed are many contracts of</p> <p>25 insurance) since, in its widest sense, an</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 indemnity is an obligation imposed by operation</p> <p>3 of law or by agreement of the parties. In the</p> <p>4 narrower sense in which, in the current context,</p> <p>5 the expression occurs, a contract of indemnity</p> <p>6 denotes a contract where the person who gives</p> <p>7 the indemnity undertakes his indemnity</p> <p>8 obligation by way of security for the</p> <p>9 performance of an obligation by another. Its</p> <p>10 essential distinguishing feature is that, unlike</p> <p>11 a contract of guarantee (strictly so called), a</p> <p>12 primary liability falls upon the giver of the</p> <p>13 indemnity."</p> <p>14 Now, do you understand that what's</p> <p>15 being said here is the word "indemnity" in</p> <p>16 English law is used in two different senses?</p> <p>17 A. That seems to be what he's saying.</p> <p>18 There is a wider sense and a narrower sense.</p> <p>19 Q. And the narrower sense where the rule</p> <p>20 of Holme v. Brunskill does not apply is the</p> <p>21 narrower sense where you're dealing with a</p> <p>22 contract of indemnity where you're dealing with</p> <p>23 a primary obligation, correct?</p> <p>24 A. The only situation in which the rule</p> <p>25 in Holme v. Brunskill -- well, the rule in Holme</p>

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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 v. Brunskill applies to guarantees. It doesn't</p> <p>3 apply to contracts of indemnity. So if you have</p> <p>4 a contract of guarantee, the rule in Holme v.</p> <p>5 Brunskill would apply. If you don't, it</p> <p>6 doesn't.</p> <p>7 Q. Right. And the context for making</p> <p>8 that statement, that it doesn't apply to</p> <p>9 contracts of indemnity, is through use of the</p> <p>10 term "contracts of indemnity" in the narrower</p> <p>11 sense as described here in Vossloh, correct?</p> <p>12 A. I think if what you're saying, arising</p> <p>13 from what Sir William Blackburne says, is a</p> <p>14 contract of indemnity might, in a broader sense,</p> <p>15 include a contract of guarantee. The rule --</p> <p>16 the non-application of the rule in Holme and</p> <p>17 Brunskill applies not to a broader category of</p> <p>18 contract of indemnity since that can include a</p> <p>19 contract of guarantee; it would only apply to a</p> <p>20 contract of indemnity which is not a contract --</p> <p>21 Sorry. The rule in Holme v. Brunskill</p> <p>22 would only apply to a contract of guarantee and</p> <p>23 not a contract of indemnity. I'm not sure I</p> <p>24 could put it any other way.</p> <p>25 Q. Okay. But the term "indemnity," an</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 obligation imposed by agreement of the parties,</p> <p>3 is in one sense the same as a contract of</p> <p>4 guarantee, correct?</p> <p>5 A. I think what he's saying is that it</p> <p>6 can, in a broader sense, include a contract of</p> <p>7 guarantee.</p> <p>8 Q. The point is that the label</p> <p>9 "indemnity" is confusing precisely because it's</p> <p>10 used in two different ways in English law,</p> <p>11 correct?</p> <p>12 A. He is warning that it can be</p> <p>13 confusing.</p> <p>14 Q. And in fact, that may account for why,</p> <p>15 in certain cases, you see they're dealing with a</p> <p>16 contract that talks about indemnity in the</p> <p>17 language of the contract and yet they hold that</p> <p>18 it's a contract of guarantee, not a contract of</p> <p>19 indemnity, correct?</p> <p>20 A. You say in cases they say that.</p> <p>21 Q. I'll show you some examples if you</p> <p>22 would like. I'm sure you're familiar with them.</p> <p>23 A. I think it follows --</p> <p>24 MR. DeLEEUEW: Objection. Just ask</p> <p>25 questions, please.</p>
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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 Can we have the question read back?</p> <p>3 Because I think I've lost the track.</p> <p>4 BY MR. ISAKOFF:</p> <p>5 Q. Okay. And in fact, that may account</p> <p>6 for why, in certain case, you see them dealing</p> <p>7 with language of the contract -- an indemnity in</p> <p>8 the language of the contract and yet hold that</p> <p>9 it's a contract of guarantee, not a contract of</p> <p>10 indemnity?</p> <p>11 MR. DeLEEUEW: I'm going to object to</p> <p>12 form.</p> <p>13 A. There will be cases where, despite the</p> <p>14 label used by the party, "indemnity," the court</p> <p>15 concludes that what is being talked about is a</p> <p>16 guarantee.</p> <p>17 Q. And not just the label on the top of</p> <p>18 the clause, but the use of the word "indemnity"</p> <p>19 in the very terms of the clause?</p> <p>20 A. That is also possible, if in fact the</p> <p>21 nature of the obligation which is being set out</p> <p>22 is in fact a secondary rather than a primary</p> <p>23 obligation.</p> <p>24 Q. Okay. Would you turn, please, to page</p> <p>25 313 of Vossloh, and I'd like to turn your</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 attention to paragraph 27, where Sir William</p> <p>3 Blackburne says, "Whether a particular contract</p> <p>4 of suretyship is of the one kind or the other</p> <p>5 or, indeed, a combination of the two turns on</p> <p>6 its true construction. A contract which</p> <p>7 contains a provision preserving liability in</p> <p>8 circumstances where a guarantor would otherwise</p> <p>9 be discharged (for example, the granting of time</p> <p>10 by the creditor to the principal or a material</p> <p>11 variation of the underlying contract between the</p> <p>12 principal and the creditor, without (in either</p> <p>13 case) the guarantor's consent) will usually</p> <p>14 indicate that the contract is one of guarantee</p> <p>15 because such a provision would be unnecessary if</p> <p>16 the contract were one of indemnity."</p> <p>17 Do you agree with that?</p> <p>18 A. Well, to my mind you have to read -- I</p> <p>19 don't disagree with this, but in order to</p> <p>20 understand what Sir William Blackburne is</p> <p>21 saying, you have to read what he goes on to say,</p> <p>22 which is that, "On the other hand, a provision</p> <p>23 stating that the surety is to be liable in</p> <p>24 circumstances where the principal has ceased to</p> <p>25 be liable may be indicative either of guarantee</p>

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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 guarantee and indemnity, that is right. But the</p> <p>3 key provision in the schedule, the key operative</p> <p>4 provision in the schedule is paragraph 1, which</p> <p>5 is headed Indemnity by the Surety, and that to</p> <p>6 my mind does carry some weight. It's not</p> <p>7 conclusive, I've never suggested it was</p> <p>8 conclusive, but it carries weight.</p> <p>9 Q. And in fact, there are cases where the</p> <p>10 term "indemnity" used in the terms -- I may have</p> <p>11 asked you this already -- is nonetheless still</p> <p>12 construed by courts as a contract of guarantee,</p> <p>13 not a contract of indemnity, correct?</p> <p>14 A. You have asked me that already, and</p> <p>15 the answer is still correct.</p> <p>16 Q. Okay. Now, in paragraph 2 you focus</p> <p>17 on the fact that the term "primary obligation"</p> <p>18 appears, those words appear in paragraph 1 of</p> <p>19 Schedule 4, correct?</p> <p>20 A. In paragraph 2, I make the point that</p> <p>21 paragraph 1 of Schedule 4 makes it expressly</p> <p>22 clear that what is intended of the surety is</p> <p>23 that he give a primary obligation. I refer also</p> <p>24 to Section 10 of the lease, which again reflects</p> <p>25 the fact that what is intended here is that this</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 obligation be a primary obligation.</p> <p>3 Q. Okay. Let's just focus on paragraph</p> <p>4 1. What is it about -- what is it about the</p> <p>5 words "primary obligation" as used in paragraph</p> <p>6 1 which makes it an indemnity rather than a</p> <p>7 guaranty, if anything?</p> <p>8 A. Well, referring back to the VAG case,</p> <p>9 the William Blackburne decision, you will recall</p> <p>10 that what Sir William does is to identify that</p> <p>11 perhaps the key distinguishing feature between</p> <p>12 contracts of guarantee and contracts of</p> <p>13 indemnity relates to whether the obligation</p> <p>14 being undertaken is a primary or secondary</p> <p>15 obligation.</p> <p>16 It seems to me, therefore, that where</p> <p>17 the parties go out of their way expressly to</p> <p>18 state that the obligation is a primary</p> <p>19 obligation, although that may not be of itself</p> <p>20 conclusive, it is again a strong indicator that</p> <p>21 what the parties intended here was a contract of</p> <p>22 indemnity and not a contract of guarantee.</p> <p>23 Q. Because they used the words "primary</p> <p>24 obligation"?</p> <p>25 A. Because they intend that this should</p>
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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 be a primary obligation.</p> <p>3 Q. Well, you're -- that's the conclusion</p> <p>4 you're reaching is that that's what they</p> <p>5 intended. Is it -- but that's based upon, in</p> <p>6 part, their use of the words "primary</p> <p>7 obligation," in your opinion, correct?</p> <p>8 A. Well, contractual interpretation is</p> <p>9 intended to find the intention of the parties.</p> <p>10 If the parties use the words "primary</p> <p>11 obligation," that is an indication that that is</p> <p>12 what they intended.</p> <p>13 Q. But it's by no means conclusive,</p> <p>14 correct?</p> <p>15 A. Of itself, there are cases which say</p> <p>16 that simply because you use the word "primary</p> <p>17 obligation" you cannot term what would otherwise</p> <p>18 be a guarantee into a contract of indemnity, but</p> <p>19 again, the fact that it's not of itself</p> <p>20 conclusive doesn't mean that it's not of some</p> <p>21 substantial relevance.</p> <p>22 Q. Do you know of any cases that have</p> <p>23 rejected the idea that a term using the words</p> <p>24 "primary obligation" is nonetheless a contract</p> <p>25 of guarantee?</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 A. There is certainly a case cited either</p> <p>3 by myself or Mr. Millett. I can't off the top</p> <p>4 my head remember what it was. I think it was</p> <p>5 Mr. Justice Blair, and one of the decisions</p> <p>6 refers to this, that the fact that you use</p> <p>7 "primary obligation" doesn't term what would</p> <p>8 otherwise be a contract of guarantee into a</p> <p>9 contract of indemnity.</p> <p>10 Q. Let's turn back, if you would, to</p> <p>11 Vossloh, Exhibit 103, and I would like you to</p> <p>12 turn your attention to page 322, paragraph 44</p> <p>13 and 45. 45 -- 44, the middle of the paragraph,</p> <p>14 he says, subclauses (d) and (e) are worded as</p> <p>15 primary obligations, and then at the beginning</p> <p>16 of paragraph 45, he writes, "I do not consider</p> <p>17 that the opening words of clause 2 are effective</p> <p>18 to convert into purely primary obligations which</p> <p>19 are otherwise secondary in nature."</p> <p>20 Is this an example of a circumstance</p> <p>21 in which an obligation expressed to be a primary</p> <p>22 obligation is in fact deemed secondary?</p> <p>23 MR. DeLEEuw: Objection to form.</p> <p>24 Go ahead.</p> <p>25 A. Sorry. Can you repeat the question?</p>

<p style="text-align: right;">Page 66</p> <p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 Q. All right. Let's maybe ask a couple</p> <p>3 of questions about it. First of all, the Moschi</p> <p>4 case, M-O-S-C-H-I, correct?</p> <p>5 A. Correct.</p> <p>6 Q. That is not a lease case, correct?</p> <p>7 A. That is not a lease case.</p> <p>8 Q. It's a commercial contract not</p> <p>9 involving any interest in land, correct?</p> <p>10 A. Correct.</p> <p>11 Q. All right. And just to go back to the</p> <p>12 question I asked, it is the case, is it not,</p> <p>13 that LBHI can only be liable for something that</p> <p>14 occurred before -- that arises out of something</p> <p>15 that occurred before the lease terminated?</p> <p>16 A. LBHI can only be liable for something</p> <p>17 that arises out of something done or not done by</p> <p>18 LBL during the period of the tenancy.</p> <p>19 Q. Right. And the dispute here is</p> <p>20 whether, among other things, the Rainey case,</p> <p>21 R-A-I-N-E-Y, is the law of England or whether</p> <p>22 the authorities cited by Mr. Millett on the law</p> <p>23 of England as to whether a default by the tenant</p> <p>24 before the lease terminates can give rise to</p> <p>25 damages that are measured in part by rent that</p>	<p style="text-align: right;">Page 67</p> <p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 would have been due had the lease not</p> <p>3 terminated?</p> <p>4 MR. DeLEEuw: Objection to form.</p> <p>5 Go ahead.</p> <p>6 Q. Correct?</p> <p>7 A. No, I would not characterize that as</p> <p>8 the dispute that arises here. It is part of the</p> <p>9 dispute that arises here, but as you know from</p> <p>10 my report, in my view, the proper interpretation</p> <p>11 of paragraph 1 is that there are two parts to</p> <p>12 paragraph 1. There's the first part, which ends</p> <p>13 about six lines down, before the provision</p> <p>14 starts looking at "the surety shall indemnify,"</p> <p>15 et cetera. The point that you make about Rainey</p> <p>16 and Reichman is relevant only to the first part</p> <p>17 of paragraph 1.</p> <p>18 If I am right in the view I express</p> <p>19 about the scope of paragraph 1, that's to say it</p> <p>20 contains two parts, then Reichman and Rainey are</p> <p>21 completely irrelevant to whether or not Canary</p> <p>22 Wharf are entitled to an indemnity under the</p> <p>23 second part of paragraph 1. It simply doesn't</p> <p>24 arise.</p> <p>25 Q. Okay. Let's focus on the second part</p>
<p style="text-align: right;">Page 68</p> <p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 of paragraph 1 and see if we can understand what</p> <p>3 you're saying. You are saying that if a default</p> <p>4 by the tenant before the lease terminates</p> <p>5 results in damages, LBHI as well as the tenant</p> <p>6 are liable for those damages, correct?</p> <p>7 A. I'm saying that if the landlord</p> <p>8 suffers loss, damage, costs or anything else as</p> <p>9 a -- by reason of or arising directly out of any</p> <p>10 default by the tenant in the performance of</p> <p>11 obligations -- of its obligations, then the</p> <p>12 landlord, that's to say Canary Wharf, is</p> <p>13 entitled to be indemnified by LBHI in respect of</p> <p>14 those losses, and that's what this provision</p> <p>15 says.</p> <p>16 Q. Right. And so LBHI would be liable</p> <p>17 for the same losses, in your view, that the</p> <p>18 tenant would be liable for as a result of the</p> <p>19 default of the tenant, correct?</p> <p>20 A. Not necessarily. There's nothing in</p> <p>21 the second part of this paragraph which suggests</p> <p>22 that the tenant would have to be liable for</p> <p>23 those losses. In fact, there is nothing at all</p> <p>24 which leads one to that conclusion. They may or</p> <p>25 may not be liable for those losses.</p>	<p style="text-align: right;">Page 69</p> <p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 Q. What is there in this that suggests</p> <p>3 that the landlord would be liable -- that LBHI</p> <p>4 would be liable where the tenant is not equally</p> <p>5 liable?</p> <p>6 A. I can't see anything in this language</p> <p>7 which suggests that LBHI would be liable only</p> <p>8 when the tenant is liable.</p> <p>9 Q. That's not the question I asked you.</p> <p>10 The question is what -- what is there in this</p> <p>11 language that suggests that the tenant would not</p> <p>12 be liable to the same extent as any liability of</p> <p>13 LBHI?</p> <p>14 MR. DeLEEuw: Objection, and the</p> <p>15 answer was responsive.</p> <p>16 A. Well, I can repeat my answer. The</p> <p>17 words here say that the tenant -- sorry, "LBHI</p> <p>18 will be liable to indemnify the landlord against</p> <p>19 all claims demands, losses," whatever,</p> <p>20 "sustained by the landlord by reason of or</p> <p>21 arising indirectly out of any default by the</p> <p>22 tenant in the performance or observance of any</p> <p>23 of its obligations of the payment of any rents."</p> <p>24 There is nothing there which requires</p> <p>25 that the tenant should be liable.</p>

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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 Q. And in your view, that's true even if</p> <p>3 Rainey is wrong as to what the law of England</p> <p>4 is?</p> <p>5 A. In my view, the second part of that</p> <p>6 paragraph applies regardless of who is right as</p> <p>7 between Rainey and Reichman.</p> <p>8 Q. So --</p> <p>9 A. It has nothing to do with it.</p> <p>10 Q. So even if, on the default of the</p> <p>11 tenant and an exercise of the right of</p> <p>12 forfeiture by the landlord, the tenant is not</p> <p>13 liable for any damages as to rent following</p> <p>14 forfeiture, LBHI would be liable?</p> <p>15 A. That's what the provision says.</p> <p>16 Q. That's what you say it says?</p> <p>17 A. Well, plainly that is my opinion as to</p> <p>18 what it means.</p> <p>19 Q. Are you aware of any case that has</p> <p>20 held so on any remotely similar facts?</p> <p>21 A. Cases tend to turn on facts and on</p> <p>22 particular provisions. I'm not aware of any</p> <p>23 case which has had a provision identical to this</p> <p>24 which has had to consider the question one way</p> <p>25 or the other.</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 Q. Are you aware of anything that would</p> <p>3 have suggested to LBHI at the time of the</p> <p>4 negotiations that it could be liable for rent</p> <p>5 following the termination of the lease even if</p> <p>6 LBL would not be so liable?</p> <p>7 MR. DeLEEuw: Objection to form.</p> <p>8 A. In the first place, at the time of</p> <p>9 negotiations and what occurred to them at the</p> <p>10 time of negotiations is, as a matter of English</p> <p>11 interpretation of contracts, completely</p> <p>12 irrelevant. What matters here are the words</p> <p>13 that the parties used in the contract as</p> <p>14 construed against the factual background.</p> <p>15 I have no basis at all for thinking</p> <p>16 that there was anything which meant that LBHI</p> <p>17 should not have understood that these words</p> <p>18 would be given their ordinary meaning and</p> <p>19 effect.</p> <p>20 Q. Doesn't clause 2 of this agreement</p> <p>21 suggest exactly the opposite, which is that</p> <p>22 LBHI, looking at this agreement, including</p> <p>23 Section 1, would understand that its liability</p> <p>24 would be the same as LBL's?</p> <p>25 A. I don't see that it does say that. It</p>
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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 simply says that they will be jointly -- the</p> <p>3 surety, just looking at words, the surety hereby</p> <p>4 further covenants with the landlord and has a</p> <p>5 separate covenant with the management company</p> <p>6 that the surety is jointly and severally liable</p> <p>7 with the tenant for the fulfillment of all its</p> <p>8 obligations of the tenant under this lease and</p> <p>9 agrees that the landlord of the management --</p> <p>10 or, the management company in the enforcement of</p> <p>11 its rights hereunder may proceed against the</p> <p>12 surety if the surety was named as the tenant in</p> <p>13 this lease.</p> <p>14 That suggests to me fairly strongly</p> <p>15 that what was intended here was an indemnity</p> <p>16 rather than a guarantee.</p> <p>17 Q. Well, now we're getting to a separate</p> <p>18 subject. I'm saying that just looking at it</p> <p>19 wouldn't that suggest that the limits of LBHI's</p> <p>20 liability would be as if it were the tenant;</p> <p>21 isn't that what it says?</p> <p>22 A. It doesn't intend to limit paragraph 1</p> <p>23 in that way. It's a further provision. There's</p> <p>24 nothing there which suggests that it was</p> <p>25 intended to limit what is said in paragraph 1.</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 Q. Does the question -- does your opinion</p> <p>3 that Section 1 would put a liability on LBHI</p> <p>4 beyond LBL's liability in the event of a default</p> <p>5 by LBL depend on the distinction between a</p> <p>6 contract of indemnity and a contract of</p> <p>7 guarantee?</p> <p>8 A. No, it doesn't. I'm looking at the</p> <p>9 words that the parties have used. The words</p> <p>10 that they have used suggest to me that LBHI's</p> <p>11 liability does not depend on a liability --</p> <p>12 being able to establish a liability with regard</p> <p>13 to the tenant. That leads to the conclusion</p> <p>14 that this is an indemnity, not a guarantee</p> <p>15 rather than the analysis being the other way</p> <p>16 around.</p> <p>17 Q. And if -- if you were to have</p> <p>18 concluded that this is a contract of guarantee</p> <p>19 rather than indemnity, would you agree that</p> <p>20 LBHI's liability would be no greater than LBL's</p> <p>21 in the event of a default?</p> <p>22 A. With respect, I don't understand the</p> <p>23 logic of the question. It seems to me you</p> <p>24 conclude whether something is a guarantee or an</p> <p>25 indemnity by construing the words of the</p>

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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 contract to see what way you arrive at. You</p> <p>3 can't conclude that it's a guarantee and then</p> <p>4 come back and reinterpret the words. The</p> <p>5 process is the other way around.</p> <p>6 Q. Well, then maybe I have just asked the</p> <p>7 question inartfully.</p> <p>8 If one were to conclude that this is a</p> <p>9 contract of a guarantee, would that necessarily</p> <p>10 also mean that LBHI's liability is no greater</p> <p>11 than LBL's would be?</p> <p>12 A. If the conclusion that you have</p> <p>13 reached is that this is a contract of guarantee,</p> <p>14 then as part of the analysis which enables you</p> <p>15 to reach that conclusion, you would have had to</p> <p>16 conclude that LBHI's liability was secondary,</p> <p>17 and it would follow from that that what you have</p> <p>18 concluded was that LBHI could not be liable,</p> <p>19 saving circumstances where LBL was also liable.</p> <p>20 Q. Okay.</p> <p>21 A. Indeed, it was also primarily liable</p> <p>22 as opposed to LBHI being secondarily liable.</p> <p>23 Q. In terms of LBHI being primarily as</p> <p>24 opposed to secondarily liable, is there any</p> <p>25 circumstance under which LBHI could be liable</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 without there having been a default by LBL under</p> <p>3 this Schedule 4?</p> <p>4 A. I don't think that there is such a</p> <p>5 circumstance, no, because even the second part</p> <p>6 of this depends on the company having been in</p> <p>7 default -- sorry, the tenant having been in</p> <p>8 default. That is not an indication, obviously,</p> <p>9 as to whether it's a guarantee or an indemnity</p> <p>10 because in both cases the surety's acting as a</p> <p>11 security to ensure that the obligations are</p> <p>12 performed.</p> <p>13 Q. So, just to clarify, given what you</p> <p>14 have just added to what you have previously</p> <p>15 answered, there is no circumstance under which</p> <p>16 LBHI could be liable unless LBL had committed a</p> <p>17 default and was also liable, correct?</p> <p>18 A. No, that's not what I said.</p> <p>19 Q. Well, tell me whether --</p> <p>20 A. That's completely inconsistent with</p> <p>21 what I said.</p> <p>22 Q. Is there any --</p> <p>23 A. You asked --</p> <p>24 Q. Then let me rephrase the question.</p> <p>25 Is there any circumstance under which</p>
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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 LBHI could be liable under this guarantee where</p> <p>3 there has not been a default by LBL for which</p> <p>4 LBL is liable?</p> <p>5 MR. DeLEEuw: Objection to form.</p> <p>6 A. Yes. As I have already explained,</p> <p>7 under the second part of paragraph 1, there is</p> <p>8 no requirement for LBHI's liability that the --</p> <p>9 well, that Canary Wharf be able to establish</p> <p>10 that LBL would also be liable.</p> <p>11 Q. Maybe my question was inartful again.</p> <p>12 Is there any circumstance in which</p> <p>13 LBHI could be liable to Canary Wharf where LBL</p> <p>14 has not committed a default?</p> <p>15 MR. DeLEEuw: Objection. Asked and</p> <p>16 answered.</p> <p>17 A. That has been asked and answered and</p> <p>18 my answer is the same. In order for LBHI to be</p> <p>19 liable, LBL will have to have committed a</p> <p>20 default in the terms, for example, identified in</p> <p>21 the second part of paragraph 1.</p> <p>22 But just to be clear, again, so</p> <p>23 there's no doubt between us, it doesn't follow</p> <p>24 from that that that is a default for which LBL</p> <p>25 needs to be liable in order for LBHI to be</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 liable.</p> <p>3 Q. But there can be no liability unless</p> <p>4 LBL has -- on LBHI unless LBL has committed a</p> <p>5 default, correct?</p> <p>6 MR. DeLEEuw: Objection to form.</p> <p>7 A. My answer is the same, correct.</p> <p>8 Q. That is correct?</p> <p>9 A. That is correct.</p> <p>10 Q. But your view under Rainey, if Rainey</p> <p>11 were the law of England, is that if LBL is in</p> <p>12 default, it would be liable to the same extent</p> <p>13 that you're saying LBHI is liable, correct?</p> <p>14 A. I find the question a little bit</p> <p>15 confusing. You're asking me about my view about</p> <p>16 Rainey. I've already explained that in the</p> <p>17 second part of paragraph 1, the position with</p> <p>18 regard to Rainey is irrelevant. It simply</p> <p>19 doesn't arise. It is -- it's just not a point</p> <p>20 which arises.</p> <p>21 Q. If you were correct that Rainey is the</p> <p>22 law of England --</p> <p>23 A. Uh-huh.</p> <p>24 Q. -- then LBL's liability for its</p> <p>25 default would be the same as LBHI's, in your</p>

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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 on which I base is my ability as a result of a</p> <p>3 great deal of experience in interpreting</p> <p>4 commercial contracts.</p> <p>5 Q. Have you ever seen the words "for the</p> <p>6 avoidance of doubt" in any of the contracts that</p> <p>7 you have interpreted?</p> <p>8 A. I have, and I've also seen contracts</p> <p>9 which don't have the words "for the avoidance of</p> <p>10 doubt" but which are construed as including</p> <p>11 those words "for the avoidance of doubt."</p> <p>12 Q. But you would agree that, other than</p> <p>13 for the avoidance of doubt, that 6(d) is</p> <p>14 superfluous were this a contract of indemnity,</p> <p>15 correct?</p> <p>16 MR. DeLEEUW: Objection.</p> <p>17 A. My answer remains the same. I agree</p> <p>18 that if this were a contract of indemnity, you</p> <p>19 would not need those words. You would not need</p> <p>20 I think any part of paragraph 6.</p> <p>21 Q. And in fact, a provision such as 6(d)</p> <p>22 is very common to see in commercial contracts of</p> <p>23 guarantee, correct?</p> <p>24 A. Provisions like 6(d) are common in</p> <p>25 contracts which are intended to ensure that</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 someone cannot, by arguing that the contract is</p> <p>3 a contract of guarantee, find a liability</p> <p>4 discharged.</p> <p>5 Q. And in fact, it's very common in</p> <p>6 contracts that are construed to be contracts of</p> <p>7 guarantee, correct, in order to avoid the very</p> <p>8 technical rules of Holme v. Brunskill?</p> <p>9 A. I'm not sure that that question is</p> <p>10 different to the question you have just asked.</p> <p>11 In my opinion, including provisions</p> <p>12 like this in a contract are common in order to</p> <p>13 ensure that someone cannot, by arguing that the</p> <p>14 contract is one of guarantee, discharge</p> <p>15 themselves from liability by reliance on the</p> <p>16 rule in Holme and Brunskill. Regardless of</p> <p>17 whether the contract is in fact one of guarantee</p> <p>18 or indemnity, they are for the avoidance of</p> <p>19 doubt.</p> <p>20 Q. Would Section 7 -- Section 18 of the</p> <p>21 Landlord and Tenant Covenants Act of 1995 which</p> <p>22 appears in 6(d) have any application if this</p> <p>23 were a contract of indemnity?</p> <p>24 A. No.</p> <p>25 Q. So it would only have meaning in the</p>
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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 context of a contract of guarantee, correct?</p> <p>3 A. It would only be relevant in the</p> <p>4 context of a contract of guarantee.</p> <p>5 (Exhibit 105, Western Credit, Ltd. v.</p> <p>6 Alberly, marked for identification, as of</p> <p>7 this date.)</p> <p>8 BY MR. ISAKOFF:</p> <p>9 Q. I've marked as Exhibit 105 a case that</p> <p>10 Mr. Millett discusses, Western Credit, Ltd. v.</p> <p>11 Alberly. Are you familiar with this case?</p> <p>12 A. I would have read it as an exhibit to</p> <p>13 Mr. Millett's report, but I don't recall the</p> <p>14 precise details relating to this case.</p> <p>15 Q. Okay. Well, I would turn your</p> <p>16 attention to page 940, and the first paragraph</p> <p>17 begins, "The word 'indemnity' is used but the</p> <p>18 sentence is descriptive in its context of the</p> <p>19 kind of non-performance or non-observance which</p> <p>20 might arise under the guarantee following, as it</p> <p>21 does the guarantee of the performance and</p> <p>22 observance by the higher of the agreement. I</p> <p>23 cannot read it as an indemnity," et cetera, and</p> <p>24 then the other judge at the bottom of the page</p> <p>25 where it also refers to -- the second part</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 commences, "I will indemnify you," and, "The</p> <p>3 final sentence reverts to the word 'guarantee'</p> <p>4 and expressly provides that it shall not be</p> <p>5 affected by the giving of time and to the</p> <p>6 higher, a provision which would, of course, be</p> <p>7 apt in the case of a guarantee but wholly inapt</p> <p>8 in the case of an indemnity," and this -- they</p> <p>9 construe this as a guarantee, not an indemnity?</p> <p>10 A. Uh-huh.</p> <p>11 Q. How would you square this case with</p> <p>12 your analysis?</p> <p>13 A. Every case depends upon the precise</p> <p>14 words that were used in the contract. I don't</p> <p>15 see anything in this case which undermines my</p> <p>16 analysis. I don't think I have suggested, for</p> <p>17 example, that just because you use the word</p> <p>18 "guarantee" -- "indemnity," it means that it's</p> <p>19 an indemnity, which seems to be the point</p> <p>20 they're making. Although, as we see, the point</p> <p>21 that they're making is in the context of a</p> <p>22 provision which referred both to indemnity and a</p> <p>23 guarantee.</p> <p>24 As is also made clear in one of the</p> <p>25 two passages that you have taken me to, the</p>

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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 A. A particular amount of over 200</p> <p>3 million being considered as what would be paid.</p> <p>4 Q. All right. And in fact, that's not</p> <p>5 what was agreed to, correct? That what was</p> <p>6 agreed to in the December 3, 2010 letter was</p> <p>7 that there would be a payment by LBL of one and</p> <p>8 a half million pounds in exchange for a release</p> <p>9 of all administrative claims, and then there</p> <p>10 would be a preservation of an ability to make an</p> <p>11 unsecured claim in some amount, and I'm asking</p> <p>12 if you know what that claim was?</p> <p>13 A. No, I don't know what that claim was.</p> <p>14 Q. Would you agree that if the -- this</p> <p>15 contract is construed, "the contract" referring</p> <p>16 to Schedule 4, as a contract of guarantee and</p> <p>17 also that Rainey does not accurately reflect the</p> <p>18 law of England, that LBHI's liability would be,</p> <p>19 at most, rent, et cetera, through December 20,</p> <p>20 2002 when the JPM lease took effect?</p> <p>21 MR. DeLEEUW: Objection to form.</p> <p>22 A. Can you ask that question again? I</p> <p>23 don't think I followed it.</p> <p>24 Q. Would you agree -- well, let's put</p> <p>25 aside the whole anticipatory repudiation point.</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 Let's just assume that this excludes that.</p> <p>3 If the court were to conclude that</p> <p>4 this is a contract of guarantee, not a contract</p> <p>5 of indemnity, and reject your argument on those</p> <p>6 points, and also conclude that Rainey does not</p> <p>7 correctly state the law but that liability for</p> <p>8 damages arising from lost rent following a</p> <p>9 termination is not recoverable against the</p> <p>10 tenant, that LBHI's -- LBHI would not be liable</p> <p>11 for any post-forfeiture rent?</p> <p>12 A. No, I don't think I would agree with</p> <p>13 that. Even if this is a contract of guarantee</p> <p>14 rather than an indemnity, you would still have</p> <p>15 the second part of paragraph 2, under the words</p> <p>16 of which the landlord would have suffered a loss</p> <p>17 as a result of a default on the part of the</p> <p>18 tenant, and under paragraph 2, they could claim</p> <p>19 for that loss.</p> <p>20 Q. Okay. Let me -- let me test that a</p> <p>21 little bit.</p> <p>22 MR. DeLEEUW: Just for clarity, I</p> <p>23 think the transcript refers to paragraph 2.</p> <p>24 THE WITNESS: It's the second part of</p> <p>25 paragraph 1.</p>
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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 MR. DeLEEUW: Thank you.</p> <p>3 MR. ISAKOFF: Okay.</p> <p>4 BY MR. ISAKOFF:</p> <p>5 Q. Just to test that a little bit, in the</p> <p>6 event that it's a contract of guarantee and that</p> <p>7 Rainey is incorrect as to the law of England,</p> <p>8 you would agree that the tenant would not be</p> <p>9 liable for any damages arising from loss of</p> <p>10 post-forfeiture rent, correct?</p> <p>11 A. I agree that if Rainey is wrong, the</p> <p>12 effect of that would be that Canary Wharf could</p> <p>13 not claim damages in respect of lost rent from</p> <p>14 the tenant.</p> <p>15 Q. Okay. And isn't it a general rule</p> <p>16 that in the cases of contracts of guarantee, the</p> <p>17 guarantor's liability is co-extensive with that</p> <p>18 of the tenant?</p> <p>19 A. As a general rule, that is right.</p> <p>20 Q. And so if the general rule applied and</p> <p>21 this is a contract of guarantee and the tenant</p> <p>22 is not liable because Rainey is wrong for any</p> <p>23 post-forfeiture rent-related damages, then LBHI</p> <p>24 would not be liable for any such post-forfeiture</p> <p>25 rent-related damages either putting Section 7</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 and its applicability to one side?</p> <p>3 A. I -- I see what you're saying, and I</p> <p>4 guess that's why I have some problem with the</p> <p>5 question because the question rather depends on</p> <p>6 ignoring, in my view, the second part of</p> <p>7 paragraph 1, and I find it hard to see how you</p> <p>8 can have regard to paragraph 1 and still</p> <p>9 conclude that this is a contract of guarantee.</p> <p>10 Q. Well, I'm asking you to assume for</p> <p>11 purposes of the question, and I would like to</p> <p>12 get a clear answer, putting Section 7 and</p> <p>13 anticipatory repudiation and all of that to one</p> <p>14 side, and assuming that it's a contract of</p> <p>15 guarantee, and assuming that Rainey is</p> <p>16 inaccurate in reading the law of England, isn't</p> <p>17 it a fact that LBHI could not be liable for</p> <p>18 anything post-forfeiture?</p> <p>19 A. Assuming Rainey is wrong and assuming</p> <p>20 this is not an indemnity --</p> <p>21 Q. And assuming it's a contract?</p> <p>22 A. -- and assuming it's a guarantee --</p> <p>23 Q. Yes.</p> <p>24 A. -- and assuming, therefore, that the</p> <p>25 principle of co-extensiveness applies, it would</p>

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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 follow from the principle of co-extensiveness</p> <p>3 that the surety could not be liable for anything</p> <p>4 that the tenant could not be liable for.</p> <p>5 Q. And if -- another hypothetical --</p> <p>6 assuming that Rainey is wrong, and putting</p> <p>7 Section 7 to one side, even if it's an</p> <p>8 indemnity, LBHI would still not be liable for</p> <p>9 post-forfeiture rent unless the court construes</p> <p>10 Section 1 in the way that you construe it as</p> <p>11 imposing liability on LBHI beyond what LBL might</p> <p>12 be liable for, correct?</p> <p>13 MR. DeLEEUEW: Let me -- give me a</p> <p>14 second.</p> <p>15 Objection to form.</p> <p>16 A. Can you repeat the question?</p> <p>17 Q. Yes. Putting Section 7 and</p> <p>18 anticipatory repudiation to one side, and</p> <p>19 assuming that Rainey is incorrectly decided and</p> <p>20 that the tenant would not be liable for any</p> <p>21 post-forfeiture rent-related damages, even if</p> <p>22 Schedule 4 is construed to be a contract of</p> <p>23 indemnity, LBHI would still not be liable for</p> <p>24 any forfeiture, post-forfeiture rent-related</p> <p>25 damages unless the court were to agree with your</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 construction under which LBHI might be liable</p> <p>3 for damages beyond what LBL could be liable for,</p> <p>4 correct?</p> <p>5 MR. DeLEEUEW: Objection to form.</p> <p>6 You can answer.</p> <p>7 A. Even assuming -- if this is an</p> <p>8 indemnity and if Rainey -- regardless of Rainey,</p> <p>9 as I think I have already said, the effect of</p> <p>10 the second part of paragraph 1 is that the</p> <p>11 landlord has a claim against the surety</p> <p>12 regardless of whether it could have a claim</p> <p>13 against LBL, regardless of whether LBL would be</p> <p>14 liable.</p> <p>15 Q. Mr. Rabinowitz, I'm showing you what</p> <p>16 has been marked as, previously, as Exhibit 20,</p> <p>17 and I'm going to focus your attention on what</p> <p>18 begins a couple of pages into it as what I have</p> <p>19 referred to as the forfeiture agreement, which</p> <p>20 is the letter of December 3, 2010 as between</p> <p>21 Canary Wharf and LBL.</p> <p>22 Are you familiar with the document?</p> <p>23 A. I have seen this document, yes.</p> <p>24 Q. And one of the questions that comes up</p> <p>25 is whether, by this document, LBHI is absolved,</p>
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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 in whole or in part, from its obligations under</p> <p>3 Schedule 4 of the LBL lease. You understand</p> <p>4 that to be an issue?</p> <p>5 A. Yes.</p> <p>6 Q. And one of the questions concerns</p> <p>7 whether Section 6(d) of Schedule 4 precludes</p> <p>8 consideration of Exhibit 20 as a material</p> <p>9 variation. Do you understand that to be true?</p> <p>10 MR. DeLEEUEW: Objection to form.</p> <p>11 You can answer.</p> <p>12 A. I understand that one of the issues</p> <p>13 that arises is if, contrary to my view, this is</p> <p>14 a contract of guarantee, then there is a</p> <p>15 question as to whether, given the provisions of</p> <p>16 6(d), even if there was a material variation as</p> <p>17 a result of clause 4, that would matter, it</p> <p>18 being my view, as I have explained in my report,</p> <p>19 that there is nothing in this letter which</p> <p>20 constitutes a material variation.</p> <p>21 Q. Okay. And first of all, would you</p> <p>22 agree that there's nothing in the forfeiture</p> <p>23 letter that purports to vary the terms of the</p> <p>24 LBL lease?</p> <p>25 A. I agree there's nothing in the</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 forfeiture letter which purports to vary the</p> <p>3 terms of the LBL lease, yes.</p> <p>4 Q. Do you know whether -- how much was</p> <p>5 outstanding in terms of amounts due Canary Wharf</p> <p>6 from LBL as of the time of the forfeiture</p> <p>7 letter?</p> <p>8 A. I think you need to be a bit clearer</p> <p>9 about your question. Are you asking about</p> <p>10 amounts -- I know there was a dispute as to how</p> <p>11 much was outstanding by way of an administrative</p> <p>12 expense. I don't know the precise figures</p> <p>13 involved. And it's fairly obvious, although I</p> <p>14 don't know the precise figures, that there was</p> <p>15 also an amount outstanding in respect of rent</p> <p>16 incurred prior to the date of this forfeiture or</p> <p>17 the date of the forfeiture, although I don't</p> <p>18 know the precise quantum of that figure.</p> <p>19 Q. Would you need -- well, I think I know</p> <p>20 the answer, but in terms of materiality,</p> <p>21 wouldn't you need to know what that figure was?</p> <p>22 A. No.</p> <p>23 Q. Why?</p> <p>24 A. Because it's irrelevant. There</p> <p>25 plainly had been a breach of obligation in terms</p>

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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 liable for damages in the form of rent which</p> <p>3 would have been due but for the forfeiture, we</p> <p>4 probably wouldn't be here today.</p> <p>5 Q. Why not?</p> <p>6 A. Because if they had agreed, if LBL had</p> <p>7 agreed that they would be liable for such</p> <p>8 damages, then the kind of arguments that LBL and</p> <p>9 LBHI are making would simply be disposed of on</p> <p>10 the basis that the parties had agreed that LBL</p> <p>11 and LBHI -- LBL and, therefore, LBHI would be</p> <p>12 liable for those amounts.</p> <p>13 Q. That would be true even if LBL was</p> <p>14 wrong as to the law and LBHI didn't agree?</p> <p>15 A. Well, if LBL had actually agreed by</p> <p>16 way of a contract that it was liable, then it</p> <p>17 just seems to me to be difficult to be running</p> <p>18 with the kind of points that are being run by</p> <p>19 LBHI.</p> <p>20 Q. And can you -- I guess the question I</p> <p>21 asked when you answered the question, I don't</p> <p>22 think you actually addressed, which is, is there</p> <p>23 any advantage to Canary Wharf in not expressly</p> <p>24 preserving a claim for damages based on lost</p> <p>25 future rent following forfeiture?</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 A. I'm not aware of any advantage to</p> <p>3 LBL -- to Canary Wharf.</p> <p>4 Q. Would you turn, please, to page 35 of</p> <p>5 your report. You are quoting here paragraph 1</p> <p>6 of Schedule 4 of the LBL lease, correct?</p> <p>7 A. Yes, that's what's set out here.</p> <p>8 Q. But you have inserted two small --</p> <p>9 well, Roman i and Roman ii in brackets that do</p> <p>10 not appear in the original document, correct?</p> <p>11 A. Correct. As I explain in my report, I</p> <p>12 have inserted the little [i] and the little [ii]</p> <p>13 in order to show what is, in my view, the</p> <p>14 correct grammatical and, indeed, legal meaning</p> <p>15 of paragraph 1 of Schedule 4. It enables</p> <p>16 analysis and that's why I put them in.</p> <p>17 Q. All right. But the parties themselves</p> <p>18 did not insert any kind of division into parts</p> <p>19 [i] and [ii] of paragraph 1, correct?</p> <p>20 A. The parties did not have the little</p> <p>21 [i] and little [ii], no.</p> <p>22 Q. Okay. Starting on page 41, you</p> <p>23 discuss a case that we had discussed briefly</p> <p>24 before, the Moschi case, M-O-S-C-H-I; that's</p> <p>25 right?</p>
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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 A. I'm just checking that it just starts</p> <p>3 on page 41. Yes, that appears to be where it</p> <p>4 starts.</p> <p>5 Q. And I think we had established that</p> <p>6 this is not a landlord-tenant or a lease case,</p> <p>7 correct?</p> <p>8 A. Correct.</p> <p>9 Q. And on page 43, you give your opinion</p> <p>10 in the middle of paragraph (6).</p> <p>11 A. Uh-huh.</p> <p>12 Q. "In principle, and as a matter of</p> <p>13 logic, one would expect the consequences of a</p> <p>14 forfeiture on the account of the tenant's breach</p> <p>15 to be the same as for the termination of a</p> <p>16 (non-lease) contract on account of repudiatory</p> <p>17 breach," and so forth. Do you see that?</p> <p>18 A. I see that.</p> <p>19 Q. Other than Rainey and other non-UK</p> <p>20 cases, what case law do you have to support</p> <p>21 that?</p> <p>22 A. The point that is being made here is</p> <p>23 that, in principle, it would be odd for there to</p> <p>24 be a difference between the consequences of a</p> <p>25 repudiatory breach and a termination of contract</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 arising in a lease case from any other</p> <p>3 contractual case, including a case, for example,</p> <p>4 for payment under installments.</p> <p>5 In terms of the specific question you</p> <p>6 ask and the reason I make that point is because</p> <p>7 what I am saying is that, in principal, you</p> <p>8 would expect the position to be the same.</p> <p>9 So far as authority is concerned,</p> <p>10 plainly Rainey would support that, although</p> <p>11 that's a Northern Ireland case, as I'm sure you</p> <p>12 have well in mind. There are, again, you say</p> <p>13 other than non-English cases, but in terms of</p> <p>14 the non-English cases, it's pretty clear, for</p> <p>15 example, in Australia and in Canada that they</p> <p>16 decide this point in line with what I have</p> <p>17 identified as, in principal, a matter of logic.</p> <p>18 I can't identify any English case.</p> <p>19 This is the point which is made in Reichman,</p> <p>20 which is in line with the law as it is in</p> <p>21 Australia, the law as it is in Canada, and</p> <p>22 indeed, as the statement of the law was put</p> <p>23 forward in Reichman.</p> <p>24 Q. And you would agree as an expert</p> <p>25 practitioner in commercial litigation that the</p>

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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 law sometimes contains anomalies, correct?</p> <p>3 A. The law sometimes contains anomalies</p> <p>4 where there is some principle or matter of logic</p> <p>5 which explains those anomalies. Equally,</p> <p>6 however, where there is some anomaly in the law</p> <p>7 by virtue of some very old case which says</p> <p>8 something, and the rest of the law has moved on,</p> <p>9 I don't think it's accurate to treat English law</p> <p>10 as if it is reflected by that anomalous case</p> <p>11 which is out of line with logic, with principle,</p> <p>12 and with movements in the law.</p> <p>13 Q. And yet sometimes courts will adhere</p> <p>14 to law that has a historical basis because</p> <p>15 that's just what they sometimes do, correct?</p> <p>16 A. Well, you say sometimes they do that.</p> <p>17 Sometimes courts are bound to do that because of</p> <p>18 the system of precedent. But usually what they</p> <p>19 do is, where you have an anomalous case which is</p> <p>20 neither in line with what they regard as</p> <p>21 principle or logic or other movements in the</p> <p>22 law, they treat that case as no longer</p> <p>23 representing the law.</p> <p>24 Q. Now, are you aware of any logic at all</p> <p>25 that would account for why a termination of the</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 lease has been treated in the cases differently</p> <p>3 from the termination of a commercial contract</p> <p>4 calling for the payment of future installments?</p> <p>5 A. I understand historically why cases of</p> <p>6 lease were treated differently from cases which</p> <p>7 didn't involve property as regards the</p> <p>8 consequence -- as regards, for example, whether</p> <p>9 you could repudiate such a case or accept</p> <p>10 repudiation in such a case at all.</p> <p>11 That -- I'm not sure it's logic, but</p> <p>12 the reason for that was what is now a slightly</p> <p>13 archaic historical view, which was that, by</p> <p>14 virtue of this being a contract relating to</p> <p>15 land, it had to be treated differently. That is</p> <p>16 consistent with a number of other earlier cases</p> <p>17 which have now been surpassed or overruled or</p> <p>18 not applied.</p> <p>19 For example, there used to be a view</p> <p>20 that you couldn't have a frustration of a case</p> <p>21 of a contract of lease because it involved land.</p> <p>22 There used to be -- it used to be understood</p> <p>23 that you couldn't have a repudiation of a</p> <p>24 contract of lease because it involved land.</p> <p>25 That I think, it's probably common ground</p>
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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 between myself and Mr. Millett, no longer</p> <p>3 represents the position in English law.</p> <p>4 So if there ever was a principle basis</p> <p>5 for the view that you couldn't be able to</p> <p>6 repudiate, accept repudiation of a contract of</p> <p>7 lease and sue for damages, that basis has long</p> <p>8 disappeared, in my view.</p> <p>9 (Exhibit 107, Rainey Brothers Ltd. v.</p> <p>10 Kearney, marked for identification, as of</p> <p>11 this date.)</p> <p>12 BY MR. ISAKOFF:</p> <p>13 Q. We have marked as Exhibit 107 the case</p> <p>14 of Rainey Brothers Limited v. Kearney,</p> <p>15 K-E-A-R-N-E-Y.</p> <p>16 Are you familiar with this case?</p> <p>17 A. I am familiar with this case.</p> <p>18 Q. When did you first come across it?</p> <p>19 A. As I think we discussed at the</p> <p>20 beginning of my testimony, I came across it in</p> <p>21 the context of preparing my first report.</p> <p>22 Q. Are you aware of Rainey having ever</p> <p>23 been cited in any English court?</p> <p>24 A. I'm not aware of any English court</p> <p>25 which has thus far cited Rainey.</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 Q. Are you aware of any authoritative</p> <p>3 textbook on the law of landlord and tenant in</p> <p>4 England citing Rainey favorably?</p> <p>5 A. I'm not aware of any English textbooks</p> <p>6 which cites Rainey on the basis that it</p> <p>7 represents English law, but that, if I can</p> <p>8 explain it, is in part because this is a subject</p> <p>9 which is not treated with, in great detail, by</p> <p>10 any English textbook. And indeed, it appears to</p> <p>11 be, as you know from the Reichman case, a</p> <p>12 subject which has been largely overlooked in the</p> <p>13 case law for some time. Reichman appears to be</p> <p>14 the first case in which the issue really came up</p> <p>15 since the 1800s.</p> <p>16 Q. Is that because people simply accepted</p> <p>17 the law as it was?</p> <p>18 A. It may be because they didn't think it</p> <p>19 possible that that really could have been the</p> <p>20 law and people simply accepted that they were</p> <p>21 liable for damages. I don't know why that was.</p> <p>22 Q. You don't know one way or the other,</p> <p>23 do you?</p> <p>24 A. What don't I know one way or the</p> <p>25 other?</p>

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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 Q. Why it is that the cases that are</p> <p>3 contrary to Rainey have never been challenged in</p> <p>4 an English court?</p> <p>5 A. You said the cases that are contrary</p> <p>6 to Rainey. There is one case in the 1800s which</p> <p>7 is contrary to Rainey, a single case. There are</p> <p>8 a number of case in foreign jurisdictions which</p> <p>9 are consistent with Rainey.</p> <p>10 You are asking me why it hasn't</p> <p>11 been -- if I know whether it hasn't been</p> <p>12 challenged, and plainly, I don't know the</p> <p>13 motivations behind anyone who gets involved in</p> <p>14 these disputes, nor am I aware of the basis of</p> <p>15 any settlements or resolutions of the disputes</p> <p>16 which arise between them.</p> <p>17 Q. Would you agree that Rainey is not</p> <p>18 binding in any English court?</p> <p>19 A. I agree that Rainey is very persuasive</p> <p>20 but not binding. I have explained, I think in</p> <p>21 my report, that it's particularly persuasive</p> <p>22 because it's a judgment given by Chief Justice</p> <p>23 Hutton, Lord Chief Justice Hutton, who</p> <p>24 subsequently became a judge in the House of</p> <p>25 Lords in England, and therefore, I would suggest</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 he's particularly entitled to respect.</p> <p>3 Q. Now, I believe you have testified a</p> <p>4 few moments ago that you thought it was common</p> <p>5 ground between you and Mr. Millett that the</p> <p>6 doctrine of anticipatory repudiation applies in</p> <p>7 the courts of England now to leases; is that</p> <p>8 what you said?</p> <p>9 A. The doctrine of repudiation. Mr.</p> <p>10 Millett is somewhat -- he doesn't come down</p> <p>11 certainly one way or the other about</p> <p>12 repudiation. There is a difference between</p> <p>13 anticipatory repudiation and repudiation. I</p> <p>14 think he is slightly equivocal about his view.</p> <p>15 Q. Well, in fact that issue was expressly</p> <p>16 left open in the Reichman case, correct?</p> <p>17 A. It was expressly left open in the</p> <p>18 Reichman case, but my recollection is that there</p> <p>19 is a fair amount of textbook support which makes</p> <p>20 clear that the view in England is that you can</p> <p>21 have a repudiation of a lease contract. And I</p> <p>22 think Mr. Millett indeed acknowledges that.</p> <p>23 MR. ISAKOFF: Okay. Why don't we take</p> <p>24 a break. I'll see whether lunch is coming</p> <p>25 around or on its way. Okay?</p>
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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 THE WITNESS: Thank you.</p> <p>3 THE VIDEOGRAPHER: The time is 11:45</p> <p>4 A.M. This is the end of tape number 3.</p> <p>5 We're off the record.</p> <p>6 (Luncheon Recess.)</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 AFTERNOON SESSION</p> <p>3 L A U R E N C E R A B I N O W I T Z, resumed and</p> <p>4 testified further as follows:</p> <p>5 THE VIDEOGRAPHER: The time is 12:30</p> <p>6 P.M. This is the start of tape number 4.</p> <p>7 We're on the record.</p> <p>8 (Exhibit 108, Robert Reichman and</p> <p>9 Monica Dunn v. Sarah Beveridge and Matthew</p> <p>10 Gauntlett, marked for identification, as of</p> <p>11 this date.)</p> <p>12 EXAMINATION BY (Cont'd.)</p> <p>13 BY MR. ISAKOFF:</p> <p>14 Q. We have marked as Exhibit 108 the</p> <p>15 Reichman case. Are you familiar with this?</p> <p>16 A. Yes.</p> <p>17 Q. In your report at page 46 to 47 --</p> <p>18 A. Uh-huh.</p> <p>19 Q. -- you say, "While the case law makes</p> <p>20 clear that a claim for future rent as such</p> <p>21 cannot accrue due after forfeiture, the question</p> <p>22 of whether a damages claim accrues is the</p> <p>23 question explicitly left open by Reichman and</p> <p>24 decided affirmatively in Rainey."</p> <p>25 And I would ask you where it is in</p>

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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 cases cited in Rainey all reflect the fact that</p> <p>3 you can claim damages in those circumstances.</p> <p>4 Q. Well, we'll turn to Rainey in a</p> <p>5 moment, but -- and whether those cases are</p> <p>6 really contrary, but we'll return to that. And</p> <p>7 he says there is at least one English case to</p> <p>8 the contrary but is of some antiquity.</p> <p>9 Are you aware not only of the one case</p> <p>10 discussed here, but of any others?</p> <p>11 A. Of one case discussed here to what</p> <p>12 effect?</p> <p>13 Q. The Walls case, are you aware --</p> <p>14 A. I am aware of the Walls case.</p> <p>15 Q. Are you aware of any cases beyond that</p> <p>16 that are consistent with Walls' holding that you</p> <p>17 cannot -- that a landlord cannot recover damages</p> <p>18 for lost future rent following termination of a</p> <p>19 lease?</p> <p>20 A. So far as I'm aware, Lord Justice</p> <p>21 Lloyd's statement that the only case which says</p> <p>22 that is Walls is correct.</p> <p>23 Q. Okay. You spoke in your long answer</p> <p>24 about, paragraph 26, Woodfall on Landlord and</p> <p>25 Tenant. What is Woodfall on Landlord and</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 Tenant?</p> <p>3 A. It's a textbook on landlord and</p> <p>4 tenant.</p> <p>5 Q. Is it -- is it like the Andrews and</p> <p>6 Millett textbook is on law of guarantees, or</p> <p>7 it's about landlord and tenant or what?</p> <p>8 MR. DeLEEUEW: Objection to form.</p> <p>9 A. It's a textbook on landlord and tenant</p> <p>10 which is used by practitioners and is regarded</p> <p>11 as being reputable.</p> <p>12 Q. Okay. Is it fair to say that the --</p> <p>13 that Woodfall is more expert in the area of</p> <p>14 landlord and tenant than you are?</p> <p>15 MR. DeLEEUEW: Woodford?</p> <p>16 Q. Woodfall?</p> <p>17 A. The textbook.</p> <p>18 MR. DeLEEUEW: I'm sorry. Woodfall on</p> <p>19 Landlord and Tenant?</p> <p>20 MR. ISAKOFF: Yes.</p> <p>21 MR. DeLEEUEW: Thank you.</p> <p>22 THE WITNESS: It's fair to say that</p> <p>23 Woodfall on Landlord and Tenant is more</p> <p>24 expert. It's not at all clear whether</p> <p>25 Woodfall on Landlord and Tenant or the</p>
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<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 current author of Woodfall, whoever that is,</p> <p>3 has had Rainey drawn to his attention or,</p> <p>4 indeed, all of the authorities which are</p> <p>5 cited in Rainey drawn to his attention.</p> <p>6 It is certainly also the position that</p> <p>7 you will not find in Woodfall any analysis</p> <p>8 of Rainey or, indeed, the cases cited. It</p> <p>9 appears, therefore, that Woodfall, like Lord</p> <p>10 Justice Lloyd, was not taken to all the</p> <p>11 relevant authorities.</p> <p>12 BY MR. ISAKOFF:</p> <p>13 Q. Is it fair to say that the current</p> <p>14 edition of Woodfall reads Reichman as supporting</p> <p>15 the view that Rainey is incorrectly decided?</p> <p>16 A. It's fair to say that the current</p> <p>17 edition of Woodfall refers to Reichman in</p> <p>18 support of that proposition.</p> <p>19 Q. That a landlord may not recover</p> <p>20 damages for lost future rent once it has</p> <p>21 terminated a lease?</p> <p>22 A. That's right. What appears to have</p> <p>23 happened is that the editor of Woodfall has seen</p> <p>24 Reichman and put it in as an authority which</p> <p>25 supports that proposition.</p>	<p>1 CONFIDENTIAL - L. Rabinowitz</p> <p>2 What is also clear, as I've said, is</p> <p>3 that the editor of Reichman, the current editor</p> <p>4 of Reichman, has not looked at Rainey or indeed</p> <p>5 the other cases supporting them. It's one of</p> <p>6 those situations where the editor of a textbook</p> <p>7 simply takes a decision and puts it in for a</p> <p>8 proposition without any real analysis or further</p> <p>9 investigation.</p> <p>10 Q. All right. And reads it quite</p> <p>11 differently than you have just described, where</p> <p>12 you say that the issue of whether such damages</p> <p>13 are recoverable was left open, whereas he reads</p> <p>14 Reichman as saying that the issue was decided?</p> <p>15 A. He says it supports that propos- -- he</p> <p>16 cites it in support of that proposition. I</p> <p>17 don't think he goes into an analysis and says to</p> <p>18 say that what I've said is wrong. There's no</p> <p>19 indication at all that he went into that sort of</p> <p>20 analysis.</p> <p>21 Q. Okay. And then paragraph 27, there's</p> <p>22 a reference to a debate?</p> <p>23 A. Uh-huh.</p> <p>24 Q. But before that, it says, "It may be a</p> <p>25 logical development to hold that a landlord,</p>